



Appeal of Arthur H. Hesbon

The issues to be determined are as follows:

1. Whether respondent's proposed assessment for taxable year 1966 is barred by the applicable statute of limitations.
2. Whether appellant is entitled to nonrecognition of gain because he received property instead of money or something equivalent to money.
3. Whether appellant has shown that the federal determination, upon which respondent's proposed assessment is based, is erroneous.

In 1963 appellant participated in the incorporation of Oro-Vista Enterprises, Inc. ("Oro-Vista") in the State of Nevada. Appellant transferred certain mining claims to the corporation in exchange for 50 percent of Oro-Vista's stock. The other principal stockholder in the corporation, Norman L. Barlow, transferred his one-half interest in 676 acres of undeveloped land located near Oroville Reservoir, Oroville, California, for 50 percent of Oro-Vista's stock.

These initial stock for property interest transactions resulted in no gain or loss being recognized under federal and state law. Section 351 of the Internal Revenue Code and section 17431 of the California Revenue and Taxation Code provide that no gain or loss is recognized upon a transfer of property to a corporation in exchange for its stock or securities where the taxpayers are in control after the exchange.

Appellant and Mr. Barlow formed this corporation for the purpose of developing the land contributed by Mr. Barlow, and the corporate structure was used in order to limit the shareholders' personal liability. However, the mining claims failed to yield any value, and by 1966 they had been written off as worthless. Furthermore, by that time it was apparent that the corporation was not going to be able to acquire any alternate funds to develop the land. As a result of this realization, it was decided to liquidate Oro-Vista by returning the property to the two stockholders in return for their corporate shares so that they could attempt to sell the property. Although the property had appreciated substantially during the period it was held by the corporation, efforts to sell the land were unsuccessful, and in fact it was lost to foreclosure in 1971.

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In 1969 the Internal Revenue Service audited appellant for taxable year 1966 and determined that appellant had received a recognizable gain from the exchange of corporate stock for the one-fourth ownership in the 676 acres of undeveloped land near Oroville Reservoir, Oroville, California. The gain realized was determined to be \$122,730.00, of which \$61,365.00 was determined to be capital gains includible in income.

This determination was based on appellant's failure to elect deferral of gain pursuant to Section 333 of the Internal Revenue Code. Section 333 of the Internal Revenue Code permits shareholders of a corporation with appreciated property, but without earnings and profits, to elect to liquidate the corporation without recognizing gain by filing written elections to defer the gain within 30 days after the adoption of the plan of liquidation.

Appellant did not file a state income tax return for 1966, nor did he elect deferral of gain pursuant to section 17402 of the Revenue and Taxation Code, the state equivalent to section 333 of the Internal Revenue Code. Consequently, respondent issued a notice of proposed assessment on July 30, 1971, based upon the results of the federal audit. Appellant was determined to have taxable income for state income tax purposes of \$60,757.07, resulting in a total tax of \$3,727.99. Appellant formally protested the proposed assessment in September 1971, and at the same time, indicated that the proposed federal tax assessment was pending before the United States Tax Court. From this point until late in 1979, a period in excess of eight years, respondent repeatedly requested that appellant update the status of his petition to the United States Tax Court. After obtaining no information from appellant, respondent obtained the information needed directly from the United States Tax Court. It was determined that an opinion had been filed by the tax court on October 20, 1975. In this opinion the fair market value of the property was reduced from \$126,750.00 to \$42,250.00. The recognizable gain was determined to be \$38,230.00, of which \$19,115.00 was to be capital gains includible in income. In all other respects the position of the federal government was upheld. (See Norman L. Barlow, ¶ 75,316 P-H Memo. T.C.)

Based upon this new information, respondent issued a notice of action on January 17, 1980, which showed taxable income for state income tax purposes of

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\$18,507.07, resulting in a total tax of \$770.49. Appellant protested, stating in his appeal letter (1) that the statute of limitations barred the assessment and collection of tax, (2) that he owed no taxes because he never received any money or anything equivalent to money in the exchange of the corporation stock for the real property, and (3) that he disagreed in general with the federal-determination. The assessment was reaffirmed and this appeal followed.

Appellant's first contention is that the assessment or collection of any state income tax for taxable year 1966 is barred by the statute of limitations. Appellant is incorrect in this contention. In evaluating whether a deficiency assessment was timely, the only relevant date is the date on which the notice of proposed action was issued. (See Appeal of Casper W. and Svea Smith, Cal. St. Bd. of Equal., April 5, 1976, and Appeal of King and Dorothy Crosno, et al., Cal. St. Bd. of Equal., Jan. 9, 1979.) In the instant matter such notice was issued on July 30, 1971. However, since appellant did not file a return for 1966, the amount of taxes due for the year in question can be assessed at any time. (Rev. & Tax. Code, § 18648, subd. (a).) Under these circumstances, the deficiency assessment in question was clearly timely.

Appellant's next contention, namely, that he need not recognize gain because he received property instead of money or its equivalent, is again without merit. Under the provisions of Revenue and Taxation Code section 18031, subdivision (a), the amount of gain realized on the disposition of property is the difference between the amount realized and the adjusted basis. Further, Revenue and Taxation Code section 18031, subdivision (b) specifies that the amount realized from the disposition of the property is the sum of any money received plus the fair market value of the property (other than money) received. The adjusted basis of the corporate stock exchanged was \$4,020.00. The fair market value of the property received was \$42,250.00. Therefore, appellant had \$38,230.00 in recognizable gains, \$19,115.00 of which was capital gains includible in income.

Lastly, appellant has indicated that he disagrees with the federal determination generally; however, he has provided nothing substantive to show that the federal action was erroneous. Consequently, appellant has not met his burden of showing that

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respondent's adjustments to his income, based upon those federal determinations, are in error. This board has consistently held that where, as here, the taxpayer has failed to establish that a federal adjustment was erroneous, the determination of the Franchise Tax Board, based upon the federal adjustment should be upheld.

(See Appeal of William C. and Margaret E. Manes, St. Bd. of Equal., June 30, 1980; Appeal of Casper W. and Svea Smith, supra; Appeal of Alan R. and Vera M. Kenison, Cal. St. Bd. of Equal., March 8, 1976; Appeal of Harry and Tessie Somers, Cal. St. Bd. of Equal., March 25, 1968; and Appeal of Albion W. and Virginia B. Spear, Cal. St. Bd. of Equal., April 20, 1964.) Furthermore, it is settled law that a judicial disposition of a taxpayer's case at the federal level is highly persuasive of the result that should be reached by this board. (Appeal of John L. Sullivan, Cal. St. Bd. of Equal., Jan. 8, 1980; Appeal of M. Hunter and Martha J. Brown, Cal. St. Bd. of Equal., Oct. 7, 1974; Appeal of Dorothy C. Thorpe Glass Mfg. Corp., Cal. St. Bd. of Equal., Sept. 17, 1973.) Where, as here, appellant offers no substantive evidence to show that the federal determination was erroneous, we would not be justified in reaching a conclusion contrary to that of the tax court.

For the above reasons, respondent's assessment will be sustained.

